COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, le 10 février 2003 CAHDI (2003) 6

<u>COMITÉ DES CONSEILLERS JURIDIQUES</u>
<u>SUR LE DROIT INTERNATIONAL PUBLIC</u>
(CAHDI)

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Strasbourg, 17-18 mars 2003

POURSUITES CONTRE LE CONSEIL DE L'EUROPE DEVANT UNE COUR DE DISTRICT DE NEW YORK

Note du Secrétariat
Etablie par la Direction Générale des Affaires juridiques

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Poursuites contre le Conseil de l'Europe devant une cour de district de New York

Le 5 mars 2002, un certain M. Morgan, demandeur devant la Cour Européenne des Droits de l'Homme contre la Finlande, dont la demande fut rejetée, a porté plainte contre le Conseil de l'Europe devant une cour de district de New York.

Sans se limiter dans sa plainte au Conseil de l'Europe, le plaignant a également engagé des poursuites, directement, contre plusieurs hauts fonctionnaires et employés du Conseil de l'Europe1, ainsi que contre les Etats-Unis, la Finlande et l'ONU.

Suite à sa condamnation pour violation de la législation sur les stupéfiants en Finlande, M. Morgan a formé une requête devant la CEDH invoquant l'irrégularité de sa détention. Sa requête, qui employait un langage menaçant, abusif et provocateur, a été écartée, car considérée comme abusive. Au cours de son action intentée devant le juge de New York, il a allégué l'agression, la discrimination et la haine raciale dont il aurait fait l'objet et a demandé 200 millions de dollars américains de dommages et intérêts.

La défense a été préparée par un avocat américain en collaboration avec le service de conseil juridique du Conseil de l'Europe. Elle s'est essentiellement fondée sur l'immunité des défendeurs conformément à la « Foreign Sovereign Immunities Act » (FSIA) et sur le manque de compétence de la cour de district de New York quant aux réclamations de M. Morgan (se référer au «*Memorandum of law in support of motion by the Council of Europe including the European Court of Human Rights to dismiss the complaint* », en date du 9 juillet 2002, signé par l'avocat Aryeh Fishman).

A. La "*Foreign Sovereign Immunities Act*" (ci-après "FSIA")

Selon la législation des Etats Unis, la FSIA – qui est codifiée dans un certain nombre de sections du « *United States Code* » - constitue la seule base légale donnant compétence aux cours des Etats Unis pour connaître des affaires impliquant un Etat étranger. La définition de la notion d'Etat étranger, dans le cadre de la FSIA, inclut les agences et démembrements de cet Etat étranger, une « agence ou démembrement d'un Etat étranger » se définissant comme toute entité réunissant les trois conditions suivantes :

(1) qui a une personnalité juridique propre, morale ou autre ;
(2) qui est un organe d'un Etat étranger ou d'une subdivision politique de ce dernier, ou, dont la majorité des actions, ou autres titres de propriété, appartient à un Etat étranger ou à une subdivision politique de ce dernier ;
(3) qui n'est ni citoyen d'un Etat des Etats Unis, ni crée en vertu de la législation d'un pays tiers.

La défense a plaidé que le Conseil de l'Europe, CEDH inclue , devait être qualifié de démembrement d'un Etat étranger, car il réunissait tous les critères mentionnés ci-dessus.

Il a été conclu, que la protection de la FSIA s'étendait aux défendeurs individuels dans la mesure où ils étaient poursuivis pour des faits commis dans le cadre de leur emploi et de leur fonction au Conseil de l'Europe.

[1] Les personnes en question etaient M. Schwimmer, Secretaire Général du Conseil de l'Europe ; M. Gil-Robles, Commissaire aux droits de l'homme ; M. Schieder, Président de l'Assemblée Parlementaire ; le Président du Comité des Ministres ; Mme Palm, Président de la CEDH ; M. Fischbach, juge à la CEDH ; M. Maruste, juge à la CEDH ; M. Early, adjoint au greffier de section de la CEDH; Mme. Reid, Chef de l'Unité 11-Juridique de la CEDH; et Mme. Kutvonen, Secraitaire juridique de l'Unité 11 de la CEDH.

B. La compétence rationae materiae

Le principe d'immunité, interprété dans l'optique de la FSIA, entraîne l'incompétence juridictionnelle des cours fédérales des Etats Unis dans toutes les affaires impliquant des Etats étrangers – y compris les agences et démembrements de ces derniers -, à moins que le cas de l'espèce ne tombe sous le coup de l'une des exceptions prévues par la FSIA elle-même.

La défense a effectivement démontré, que le plaignant n'a pas établi le fait, que ses réclamations tombaient sous le coup de l'une de ces exceptions[2].

Dans son « *report and recommendation* » à la cour, le juge a accepté tous les arguments de défense énoncés ci-dessus, et a recommandé d'accueillir nos requêtes visant à rejeter la plainte de M. Morgan. (se référer au « *Report and Recommendation* » en date du 16 août 2002, signé par le juge Lois Bloom).

Le « *report and recommendation* » du juge a été adopté comme avis de la Cour dans sa décision en date du 31 décembre 2002. La cour a déclaré les objections du demandeur, tendant à rejeter la recommandation, qui visait à accueillir nos demandes, non fondées ni en droit, ni en fait. Il s'en suit, qu'un ordre de clore ce dossier a été délibéré par la cour. (se référer à l'ordre de la cour, en date du 31 décembre 2002, signé par le juge de district des Etats Unis, Carol Bagley Amon.

Le délai d'appel contre la décision de la cour est forclos depuis le 3 février 2003.

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[2] Les exceptions dans le cadre de la FSIA sont, entre autres, des allegations concernant la privation de propriété privée aux Etats-Unis liée à une activité commerciale ; la demande de compensation pécuniaire pour les blessures ou la mort, les dommages causés à, ou la perte de propriété qui se sont produites aux Etats Unis ; des allégations de torture, de massacre extrajudiciaire, de sabotage d'avion, de prise d'otages, de la fourniture d'aide materielle ou de la fourniture de ressources pour de tels actes si un tel acte ou aide est commis par un fonctionnaire, un employé ou un agent d'un Etat étranger designé en tant que commanditaire du terrorisme.

ANNEXES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

MICHAEL SOLOMON MORGAN,

Plaintiff,

-against-

02-CV-891 (CBA) (LB)

COUNCIL OF EUROPE/UNITED NATIONS; MR. WALTER SCHWIMMER, SECRETARY GENERAL OF THE COUNCIL OF EUROPE, MR. ALVARO GIL-ROBLES, COMMISSIONER OF FOR HUMAN RIGHTS EUROPEAN COMMISSION OF HUMAN RIGHTS, COUNCIL OF EUROPE; MR. PETER SCHIEDER, PRESIDENT OF THE PARLIAMENTARY ASSEMBLY, MR BRUNO HALLER, SECRETARY GENERAL OF THE PARLIAMENTARY ASSEMBLY; THE CHAIRMAN OF THE COMMITTEE OF MINISTERS; MARY ROBINSON, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, U N. HIGH COMMISSIONER FOR HUMAN RIGHTS/ THE CHIEF OF ACTIVITIES AND PROGRAMMES BRANCH OF HUMAN RIGHTS, MR. KOPFI ANNAN, UNITED NATIONS SECRETARY GENERAL; MRS. E. PALM, PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS; MR. M. FISCHBACH, JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS; MR. R. MARUSTE, JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS, MR. T.L EARLY, DEPUTY SECTION REGISTRAR; MS. VILJA KUTVONEN, LEGAL SECRETARY OF UNIT 11; and MS. KAREN REED, HEAD OF UNIT 11.

Defendants

X

MICHAEL SOLOMON MORGAN,

Plaintiff,

against-

02-CV-1471 (CBA) (LB)

Rear

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THE REPUBLIC OF FINLAND; FORMER FINNISH

Orig
#1

MINISTER OF FOREIGN AFFAIRS TARJA HALONEN: FORMER FINNISH MINISTER OF THE MINISTRY OF JUSTICE KARI HAKAMIES; FORMER FINNISH MINISTER OF THE MINISTRY OF JUSTICE JUSSI JARENTAUS; FORMER FINNISH MINISTER OF THE MINISTRY OF JUSTICE JOHANNES KOSKINEN PAAMINISTERI PAAVO LIPPONEN, VALTIONEUVOSTON KANSLIA; FORMER FINNISH PRESIDENT MARTTI AHTTISAARI TASAVALLAN PRESIDENTIN KANSLIA; KARAJATUOMARI MAKKU RATY, KARAJATUOMARI MINNA VUOLINKO; SUPREME COURT JUDGE HAARMANN & JUDGE VUORI & JUDGE JARMO HIRVONEN & JUDGE HEINONEN, COURT OF APPEALS JUDGE ANTTI JALONEN & JUDGE HELLEVI NIEMELA & JUDGE PETRI LESKINEN; MR LAURI LEHTIMAJA, PARLIAMENTARY OMBUDSMAN, MR. JAKKO JONKKA, DEPUTY PARLIAMENTARY OMBUDSMAN; MR. RAIMO VALTONON & MR. RISTO LANESTROM & MR. TIMO SALOMAKI: THE DIRECTOR OF HAMEENLINNA KESKUSVANKILA & THE DIRECTOR OF KERAVAN NUORISVANKILA, MR MAKKU SALMINEN, DIRECTOR OF PRISON ADMINISTRATION; THE FINNISH MINISTER OF THE INTERIOR; MR. RISTO RODIONOFF & MR. KARI PAKANEN & MR. RAINER LINDHOLM (CUSTOM INVESTIGATIONS), MR. ARTO KOSONEN, MR. MARKO LAINE. DIRECTOR OF THE PERMANENT MISSION OF FINLAND TO THE UNITED NATIONS, THE CONSUL OF THE CONSULATE GENERAL OF FINNLAND; THE AMBSSADOR OF THE EMBASSY OF THE REPUBLIC OF FINLAND, THE DEPUTY CHIEF OF MISSION; THE EMBASSY SWITCH BOARD OPERATORS; and THE SECRETARIES OF THE FINNISH AMBASSADOR,

Defendants.

————————————————————X

BLOOM, United States Magistrate Judge.

REPORT AND RECOMMENDATION

By Order of Referral dated July 9, 2002, the Honorable Carol B Amon, United States District Judge, referred the first case captioned-above to the undersigned for a Report and Recommendation pursuant to 28 U S.C § 636(b) (1994). Defendant, The Republic of Finland, et al., moves this Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss case 02-CV-1471. By Order dated July 16, 2002 the Honorable Carol B Amon, United States District Judge, referred the second case captioned-above to the undersigned for a Report and Recommendation pursuant to 28 U S C. § 636(b) (1994) Defendants, Council of Europe and the United Nations, et al., move this Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss case 02-CV-891. It is respectfully recommended that defendants' motions to dismiss these complaints should be granted.

BACKGROUND

Plaintiff, Michael Solomon Morgan, appearing *pro se*, filed these two complaints on March 5, 2002 [1] Plaintiff's complaints both seek damages for injuries sustained while he was incarcerated in a Finnish prison for two years.[2] In case number 02-CV-891, plaintiff names the Council of Europe ("COE")/United Nations and fourteen other defendants and in case number

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[1] On June 19, 2002, the Court received a "Courtesy copy of the proof of service as ordered" from plaintiff, which includes copies of civil summonses for cases 02-CV-891, 02-CV-1471 and 02-CV-2311 and copies of his postage receipts

[2] Plaintiff alleges that he was incarcerated in Finland for two years but he does not specify the dates of his incarceration. Compl 02-CV-1471 at 4 Plaintiff states that he appealed the Finnish Courts' decisions and then filed suit in the European Court of Human Rights on May 25, 1998

02-CV-1471, plaintiff names the Republic of Finland and twenty-two other defendants.[3] The complaints are consolidated solely for the purpose of this Report and Recommendation.

Plaintiff alleges that he is an "allegiant citizen of the United States" who was incarcerated in a Finish prison for two years, where he was tortured due to racial discrimination by prison guards and prisoners Compl 02-CV-1471 at 4[4] Plaintiff states that after four years, his appeal to the European Court of Human Rights ("ECHR") was rejected "due to threatening, abusive and provocative language in all letters that I had previously sent in order to allegedly flirt with and threaten Ms Vilja Kutvonen as an officer of the court who applies the law." Id Plaintiff further alleges that the Finnish government is denying him entry to Finland to see his wife and daughter until 2004. Compl., 02-CV-891 at 5

On May 5, 1949 a treaty created the COE and was signed by ten countries. The COE is an intergovernmental organization which aims:

> to protect human rights, pluralist democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity; to seek solutions to problems facing European society (discrimination against minorities, xenophobia, intolerance, environmental protection, human cloning, Aids, drugs, organised crime, etc); to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform.

See Council of Europe (2002), *available at* http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/An_overview/. By treaty the

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[3] Plaintiff states "[i]f a satisfactory settlement is reached in this case (MORGAN V. FINLAND), I will cancel my other complaint against the COUNCIL OF EUROPE & UNITED NATIONS of which you are also handling " Pl 's Resp to Defs ' Notice of Mot. To Dismiss at 9. Plaintiff 's response also states "I will end this letter by praying for the divine loss of all family members of the defendants and attorneys ' Id at 10.

[4] Plaintiff's submissions include one titled the "Jews, Christians & Muslims J C M International The Mutual Expectations Forum " Plaintiff is the Founder/President of J C.M., an organization "dealing with faith related crises worldwide" and "constructively derailing the so-called holy war (JEHAD) against the U S A. and Israel."

COE established the Convention for the Protection of Human Rights and Fundamental Freedoms which was entered into force in September 1953 The Convention secured enforcement of the contracting states' obligations by founding the ECHR. See ECHR (2002), *available at* http://www.echr.coe.int/Eng/EDocs/HistoricalBackground htm#echr

DISCUSSION

A. Foreign Sovereign Immunities Act

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." Saudi Arabia v Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v Amerada Hess Shipping Corp., 488 U S. 428, 443 (1989)); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F 3d 239, 242 (2d Cir 1997); 28 U S C. § 1330(a) (jurisdiction-conferring provision of FSIA); 28 U.S C. § 1604 (foreign state immune from jurisdiction of the courts of the United States).[5] The Republic of Finland and the Council of Europe are foreign states,[6] 28 U S.C. § 1603(a) and (b), and are therefore entitled to immunity from the jurisdiction of the courts of the United States See Abrams v Societe Nationale Des Chemins De Fer Francais, 175 F.Supp 2d 423 (E D N.Y. 2001) (French national railroad

[5] Plaintiff's cross motion states. "[t]his particular case (MORGAN V FINLAND) falls within the jurisdiction of United States District Courts from the stand point of various international treaties and conventions and international laws." Cross-mot at 5 Plaintiff is incorrect; the FSIA alone confers jurisdiction over foreign states in the United States courts Saudi Arabia, 507 U.S. at 355. Defendants, Republic of Finland et al, submitted a Memorandum of Law in opposition to plaintiff's cross-motion dated July 30, 2002

[6] "(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b) (b) An "agency or instrumentality of a foreign state" means any entity--(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country." 28 U.S C § 1603 (a) & (b).

company fit definition of 28 U S C. § 1603(b) as "agency or instrumentality of foreign state").

In a suit against a foreign state, the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S C. § 1330, 1602 et seq., attempts to answer three questions· "the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant." Texas Trading & Milling Corp v. Fed Republic of Nigeria, 647 F 2d 300, 306 (2d Cir. 1981) (citing House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States, H.R Rep No. 1487, 94th Cong , 2d Sess 7-8, reprinted in (1976) U.S.Code Cong. & Admin.News 6605, 6604-6)

The FSIA applies to individual defendants when they are sued in their official or individual capacity. Granville Gold Trust-Switzerland v. Commissione del Fillimento/Inter Change Bank, 924 F Supp. 397, 406 (E.D N Y 1996) (quoting Chuidian v Philippine Nat'l Bank 912 F.2d 1095, 1103 (9th Cir. 1990)); Kline v Kaneko, 685 F.Supp 386, 389 (S D.N.Y.1988) (citing Am. Bonded Warehouse Corp v. Compagnie Nationale Air France, 653 F Supp 861, 863 (N.D.Ill 1987)); Rios v Marshall. 530 F Supp. 351, 371 (S D N Y.1981)) Judges and clerks of foreign courts have also been found to be immune from suit under the FSIA. See Mueller v. Diggelman, No Civ. 5513, 1983 WL 25419, at * 2 (S D N.Y May 13, 1983) (judges and clerks of Swiss court sued in their official capacities entitled to sovereign immunity).

Plaintiff's complaints stem from his Finnish incarceration, his dissatisfaction with Finnish law, his experience in the Finnish court system and his appeal to the ECHR. Plaintiff names over thirty-five defendants and complains defendants' actions violated his rights. In his response to defendants' motions to dismiss, plaintiff asserts defendants "in this case they were not acting within the scope of their employment and position, all discoveries will substantiate that." Pl.'s Resp. to Defs.' Notice of Mot. to Dismiss at 4. Whether in their official or individual capacities, the ministers, employees and judges plaintiff names as defendants are all immune from suit under the FSIA

B Subject Matter Jurisdiction

Federal courts lack subject matter jurisdiction over claims against foreign states, unless one of the exceptions in sections 1605-1607 of the FSIA applies Saudi Arabia, 507 U S at 355, Granville Gold Trust-Switzerland, 924 F.Supp at 405 Section 1605 of the FSIA sets forth the general exceptions of sovereign immunity of foreign states Plaintiff's allegations do not fall under the FSIA exceptions in § 1605 (a)(1)-(a)(2) or (a)(4) as defendants have not waived their immunity, plaintiff's complaints are not based on commercial activity, and plaintiff does not allege that property rights in the United States are in issue.

Plaintiff cannot rely on the FSIA exception stated in 28 U S C § 1605(a)(3).[7] Plaintiff alleges,

> Indeed this section also fits and suits the conditions and circumstances upon which a specified portion of the initial complaint was solely designated for loss of property which was taken in violation of international law, in the sense that upon my unjustifiable arrest by the Finnish Police on September 17th, 1997 up until my sentence on December 5th, 1997 The Finnish Police had broken into my Company, Seized all business files and contacts, furniture, office equipments and active trading contracts worth over Seventeen Million Dollars in Africa, Asia and in the USA. AS well as certifications for FIFTY (50) newly established Finnish Corporations that I had formed through a Finnish Trading firm. . . right along the line with very precious family gold, silver, priceless old family photographs and a recently purchased British Diamond, precious Stones, Gems and Jewelry as future

[7] 28 U S C § 1605 (a)(3) states that a foreign state will not be immune in any case "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

> gifts to my wife, they were all Seized and kept in Finnish Customs Agents who had then invaded my office, Seized everything and kept them for themselves without even telling me.

Pl.'s Resp to Defs.' Notice of Mot. To Dismiss at 8-9. However, plaintiff does not state that his seized property is in the United States or that it was ever connected with commercial activity in the United States. See Texas Trading & Milling Copr., 647 F 2d at 308 (if "commercial activity" under § 1603(d) was present and bore relation to the United States as required by § 1605(a)(2), then the foreign state is "not entitled to immunity" and court has statutory subject matter over the claim through § 1330(a)); Dayton v Czechoslovak Socialist Republic et al, 834 F 2d 203, 206 (D C. Cir. 1987) ("courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory") (citing Restatement Foreign Relations Law of the United States § 469). Additionally, plaintiff's allegations do not fall under the FSIA exception stated in 28 U.S.C. § 1605(a)(5)[5] because the money damages plaintiffs seeks against the defendants for "personal injury or death, or damage to or loss of property" did not occur in the United States. See Saudi Arabia, 507 U S at 358 (alleged detention and torture by Saudi government did not fall under §1605 "commercial activity"exception).

Liberally construed, Haines v. Kerner, 404 U S. 519, 520-21 (1972), plaintiff's allegations of torture would fall under the following enumerated exception of the FSIA which states:

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[5] "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment, except this paragraph shall not apply to--(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . .." 28 U.S.C. § 1605(a)(5).

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . [I]n which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency

28 U S C. § 1605(a)(7) However, this exception requires (1) that the foreign state was designated as a sponsor of terrorism under specified statutes at the time the acts occurred, and (2) if the acts occurred in the foreign state, that the claimant has afforded the foreign states the reasonable opportunity to arbitrate the claim in accordance with international rules of arbitration, or (3) that the claimants and victims were United States Nationals at the time the acts occurred 28 U S C § 1605 (a)(7)(A)-(B)

The defendants named herein have never been designated as state sponsors of terrorism 48 C.F R. 252 209-7001(a)(2); see e g., Abrams. 175 F Supp 2d at 433 (§ 1607(a)(7) exception did not apply to France because it was not designated as state sponsor of terrorism). Furthermore, plaintiff does not claim to have been a United States national at the time of the alleged acts. He only asserts in his complaints that he is an "allegiant citizen of the United States," which by definition describes his loyalty to the United States, but not his legal status [9] Accordingly, none of the specified exceptions to the FSIA apply to provide this Court with a basis to exercise subject matter jurisdiction over plaintiff's claim See Gemini Shipping, Inc v. Foreign Trade Org. for Chems. & Foodstuffs, 647 F.2d 317, 319 (2d Cir. 1981) (court found "commercial activity" under exception in § 1603(d) and then jurisdiction over the suit based on §

[9] Plaintiff's response to defendant's Motion to Dismiss case 02-CV-1471, makes reference to a "United States Citizen" However, plaintiff never clarifies whether he is a citizen of the United States

1605(a)(2)).

C Personal Jurisdiction

Defendants also challenge personal jurisdiction in this case and argue that personal jurisdiction does not exist over the European defendants. See Defendants' Motion for case number 02-CV-891 & Defendants' Motion for case number 02-CV-1471. In its inquiry into personal jurisdiction over a foreign state, the Second Circuit has stated "[c]onstrained only by constitutional due process considerations, personal jurisdiction under the FSIA 'equals subject matter jurisdiction plus valid service of process.'" Reiss v. Societe Centrale Du Groupe Des Assurances Nationales, 235 F 3d 738, 746 (2d Cir. 2002) (quoting Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir 1991)); Texas Trading & Milling Corp., 647 F.2d at 308 As the Court lacks subject matter jurisdiction over these actions, the Court need not reach the issue of personal jurisdiction.

CONCLUSION

For the reasons set forth above, it is recommended that defendants' motions to dismiss plaintiff's complaints be granted as defendants are immune from the jurisdiction of the Courts of the United States

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections See also Fed R Civ P 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court Any request for an extension of time to file objections must be made to the District Judge within the ten day period Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v Capital Dist. Physicians' Health Plan Inc 293 F 3d 42 (2d Cir. 2002) (holding that failure to object to a magistrate judge's decision or recommendation generally forfeits the right to present those objections for appellate review), Small v. Sec'y of Health & Human Servs., 892 F.3d 15 (2d Cir. 1989), see Thomas v Arn 474 U S 140 (1985).

SO ORDERED

Lois Bloom

LOIS BLOOM
United States Magistrate Judge

Dated: August 16, 2002
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL SOLOMON MORGAN Plaintiff, -against- COUNCIL OF EUROPE, et al. Defendant.	NOT FOR PUBLICATION ORDER 02-CV-891 (CBA)
MICHAEL SOLOMON MORGAN Plaintiff, -against- THE REPUBLIC OF FINLAND, et al. Defendant.	02-CV-1471 (CBA)

AMON, UNITED STATES DISTRICT JUDGE:

The Court has received the Report and Recommendation ("R&R") of the Honorable Lois Bloom, United States Magistrate Judge, dated August 16, 2002. The Magistrate Judge recommended that the defendants' motions to dismiss the complaints be granted. On September 10, 2002, the Magistrate Judge amended the R&R to clarify the "state sponsor of terrorism exception" to the Foreign Sovereign Immunities Act. The Court received objections to the R&R from the plaintiff dated August 22, 2002. Although the plaintiff timely objected to the R&R, his objections do not set forth any grounds in law or fact to reject the recommendation that the motion to dismiss be granted. Accordingly, this Court hereby adopts the R&R as the opinion of the Court. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
December 31, 2002

Carol Bagley Amon
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL SOLOMON MORGAN, Plaintiff, -against- COUNCIL OF EUROPE AND THE UNITED NATIONS, ET AL. Defendants	Case No 02 CV- 891 (CBA)(LB)

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY THE COUNCIL OF EUROPE INCLUDING THE EUROPEAN COURT OF HUMAN RIGHTS TO DISMISS THE COMPLAINT

INTRODUCTION

Defendant, the Council of Europe ("COE"), including the European Court of Human Rights ("ECHR")[1], by undersigned counsel, and on behalf of itself and each of the individually named COE and ECHR officials and employees[2] (altogether the "European Defendants"), pursuant to Federal Rule of Civil Procedure 12(b), submit this

[1] While the Complaint does not name the ECHR itself as a defendant, it names officials and employees of the ECHR in their official capacities as defendants

[2] The individually named COE and ECHR defendants are. Walter Schwimmer, Secretary General of the COE, Alvaro Gil-Robles, Commissioner for Human Rights, COE, Peter Schieder, President of the Parliamentary Assembly of the COE, the Chairman of the Committee of Ministers of the COE, E. Palm, President of the ECHR; M Fischbach, Judge on the ECHR; R. Maruste, Judge on the ECHR; T L. Early, Deputy Section Registrar of the ECHR, Karen Reid (misspelled in the Complaint as "Reed"), Head of Unit 11-Legal of the ECHR, and Vilja Kutvonen, Legal Secretary of Unit 11 of the ECHR

Memorandum of Law in Support of European Defendants' Motion to Dismiss the Complaint of Plaintiff, Michael Solomon Morgan (the "Plaintiff"). [3]

PRELIMINARY STATEMENT

On March 5, 2002, Plaintiff filed the Complaint in the above-captioned action. Plaintiff appears to have served the complaint by registered mail on or about June 20, 2002 on the Council of Europe in Strasbourg, France, and on the individually named European Defendants on or about June 19, 2002. The Plaintiff also names the United Nations and three officials of the United Nations (including Secretary General, Kofi Annan) as additional Defendants.[4]

The Complaint alleges liability under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Federal Rule of Civil Procedure 4(F)(2)(c)(ii), 28 U.S.C. § 1331, 42 U.S.C. § 1983 and 28 U.S.C. § 1608 See Complaint of Plaintiff at p. 1, 3. However, Plaintiff's Complaint fails to state how the claims asserted against the COE, including the ECHR, and the individual European Defendants are within the subject matter jurisdiction of this Court Indeed, Plaintiff's claims cannot survive applicable principles of the law of sovereign immunity and as such must be dismissed

[3] The Local Rules provide additional protections to *pro se* plaintiffs when there is a motion for summary judgment filed by a represented party. While not an obligation under the Local or Federal Rules for a motion to dismiss, because Plaintiff is *pro se*, Plaintiff is advised of the following: The defendants in this case have moved to dismiss your case pursuant to Rule 12 of the Federal Rules of Civil procedure This means that the defendants have asked the court to decide this case without a trial, based on written materials, submitted in support of the motion, THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION by filing your own papers If you have any questions, you should direct them to the Court's Pro Se Office

[4] The Plaintiff also may have amended the Complaint to add additional Defendants at some point in the recent past; however, it is unclear if that Amended Complaint has been filed with the Court A further response will be made to the Amended Complaint if appropriate

ARGUMENT

I. BACKGROUND OF COE AND ECHR

The COE was established in 1949 by a treaty, the Statute of the Council of Europe (the "COE Statute"), entered into by 10 sovereign European countries. Since 1949, the COE has expanded by accession of additional European countries to the COE Statute. The membership of the COE now consists of 44 sovereign states Although the United States is not a member of the COE, it has had observer status at the COE since 1995.

The primary aim of the COE is

> ". . to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress " Chapter I, Article 1, Paragraph (a) of the COE Statute.

The COE, through its constituent agencies is charged with pursuing these aims to advance economic, social, cultural, scientific, legal and administrative matters and "maintenance and further realization of human rights and fundamental freedoms " Chapter I, Article 1, Paragraph (b) of the COE Statute.

The constituent organs of the COE are its Committee of Ministers and its Consultative Assembly (Chapter III, Article 10 of the COE Statute). In July 1974, the Assembly decided to utilize the name "Parliamentary Assembly", which is how it is referred to in the Complaint.

The Committee of Ministers consists of one representative of each member state, either the Minister for Foreign Affairs or a designated representative of the Minister. Chapter IV, Article 14 of the COE Statute. The Committee of Ministers is the Council of Europe's executive organ whose role and functions are defined in Chapter IV of the COE

Statute. It has the authority to take measures to advance the aims of the COE, either on its own initiative or on recommendation of the Parliamentary Assembly In general, the Ministers focus on the most important political questions relating to European cooperation and international affairs. The conclusions of the Committee of Ministers may, where appropriate, take the form of international treaties (conventions or agreements) or recommendations. The latter are addressed to the governments of member States and provide for common policies with regard to particular matters Chapter IV, Article 15 of the COE Statute

The Parliamentary Assembly consists of representatives of the parliaments of each member state Chapter V, Article 25 of the COE Statute It has the authority to debate matters within the aim and scope of the COE and to make recommendations to the Committee of Ministers Chapter V, Articles 22 and 23 of the COE Statute. The Parliamentary Assembly elects its President. The Assembly is served by officials of the COE Secretariat headed by a Secretary General of the Assembly who is elected by it The Secretary General of the Parliamentary Assembly has the rank of Deputy Secretary General of the COE.[5]

The Committee of Ministers, the Parliamentary Assembly and all other COE agencies are served by the Secretariat of the COE The Secretariat is headed by the COE's Secretary General who is appointed by the Parliamentary Assembly on the

[5] European Defendant Schieder is the President of the Parliamentary Assembly and European Defendant Haller is the Secretary General of the Parliamentary Assembly

recommendation of the Committee of Ministers Chapter VI, Article 36 of the COE Statute.[6]

The European Commissioner for Human Rights has been established by Resolution (99) 50 of the COE Committee of Ministers. Article 1 of the Resolution provides that the Commissioner is a non judicial institution to promote education in awareness of, and respect for human rights. The Commissioner is elected by the Parliamentary Assembly [7]

The ECHR was established by a treaty drawn up within the COE, the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on November 4, 1950 The ECHR consists of judges elected by the COE Parliamentary Assembly. One judge is elected from each of the countries which are party to the Convention. Judges sit in their individual capacity, enjoy guarantees of judicial independence (Article 21 of the Convention), and enjoy the special status of 'judges of the European Court of Human Rights' as defined in the Convention, the Rules of Court and in Resolution (97) 9 of the Committee of Ministers According to the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS 162, 1996), judges enjoy, in addition to the privileges and immunities specified in Article 18 of the General Agreement, "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law" (Article 1).

Hence, the COE, including the ECHR, were formed and are, within the meaning of the FSIA, controlled directly by sovereign states of Europe. In addition, all of the

[6] European Defendant Schwimmer is the Secretary General of the COE

[7] European Defendant Gil-Robles is the European Commissioner for Human Rights.

individual European Defendants are named as Defendants in their official capacities as officers or employees of the COE or ECHR As such, the COE and the ECHR and all of the other European Defendants are entitled to immunity under the FSIA.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT

Since 1976, subject matter jurisdiction of suits against foreign sovereign states has been governed by the FSIA, which is codified in a number of sections of the United States Code. Title 28 The FSIA provides the sole means by which the courts of the United States can assert jurisdiction over foreign sovereigns *See, e g., Saudi Arabia v. Nelson*, 507 U S 349, 354 (1993), *NYSA-ILA Pension Trust Fund v Indonesia*, 7 F.3d 35 (2d Cir 1993) (holding that ERISA violations by entity entitled to foreign sovereign immunity cannot create subject matter jurisdiction). Indeed, the FSIA provides that foreign states shall be immune from suit in federal and state courts, except in specified circumstances. 28 U.S C § 1604. Section 1605, in turn, sets forth the specific categories of actions as to which foreign states are not immune If a civil action against a foreign state does not fit within a Section 1605 exception to the general rule of sovereign immunity. the foreign state defendant is immune, and, concomitantly, the district court lacks subject matter jurisdiction See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S 428, 434-439 n.1 (1989) (determining that the text and structure of the FSIA demonstrate Congress's intention that the FSIA be the sole basis for obtaining subject matter jurisdiction over a foreign state in federal courts); *Verlinden B V. v. Central Bank of Nigeria*, 461 U S 480, 493 n 20 (1983); *Erickson v Alitalie Linee Aeree Italiane*, 1991 WL 117797, at *2 (D N.J. June 5, 1991).

Under 28 U.S.C. Section 1603(a), the definition of a "foreign state" for purposes of FSIA includes agencies and instrumentalities of the foreign states "[A]gency or instrumentality" of a foreign state is defined in 28 U.S.C. § 1603(b), which provides as follows:

> (b) An "agency or instrumentality of a foreign state" means any entity
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

The COE, including the ECHR, meets all of the requirements of this definition and qualifies as an instrumentality of a foreign state for purposes of FSIA. The fact that the COE, including the ECHR, is a legal person cannot be disputed In addition, a majority of the ownership interests of the COE and ECHR are held by foreign states. And the COE, including ECHR, is neither a citizen of a State of the United States nor created under the laws of a third country

Some courts have considered whether or not organizations similar to the COE or ECHR, which are "owned" by more than one sovereign state, none of which owns a majority of the organizations, can meet the majority ownership test of 28 U.S.C. § 1603(b)(2). Courts considering this issue have determined that the majority ownership test of 28 U.S.C. § 1603(b)(2) can be met by "pooling" the ownership interests of more than one sovereign state. For example, in *EAL Corp v. European Organization for the Safety of Air Navigation*, 1994 U.S. Dist LEXIS 20528 (D Del. Aug. 3, 1994) the Court found that Eurocontrol, an international commission that regulates airspace throughout Europe, qualified as an instrumentality of a foreign state under 28 U S C. §1603(b). The essential facts in the Eurocontrol case are substantially similar to the facts in this case As is true of COE and ECHR, Eurocontrol was an organization created by a treaty among a number of European states, none of whom could be said to own a majority of Eurocontrol In rejecting the argument that the majority ownership under 28 U S C § 1603(b) (2) must all be vested in a single state, the Eurocontrol court quoted with approval from *Le Donne v Gulf Air, Inc.*, 700 F Supp 1400 (E D Va 1988), where. addressing the pooling issue, the Court stated.

> In plaintiff's view, the FSIA does not apply unless majority ownership vests in a single foreign state. This is an unnecessary literalism that runs counter to the Act's purpose and ignores the well-established international practice of states acting jointly through treaty-created entities for public or sovereign purposes. If the policies that animate the FSIA are to be given their full range, it must, therefore, apply to treaty created instrumentalities jointly owned by foreign states.

Id at 1406. *See also Rios v Marshall*, 530 F. Supp. 351, 371 (S D N Y 1981) (treaty organization formed by a number of West Indies countries found to be an instrumentality of a foreign state under 28 U.S.C. § 1603(b)(2)) The COE and ECHR also meet the third test of 28 U.S C. § 1603(b) *See Le Donne*, 700 F. Supp. at 1406-1407 (footnote omitted) [8]

[8] The plaintiff in the *Le Donne* case questioned whether or not an organization deemed to be an instrumentality of a foreign state by pooling of ownership interests could meet the test of 28 U S C § 1603(b)(3) which requires that the instrumentality not be created under the laws of a third country. 700 F. Supp. at 1406. The *Le Donne* plaintiff's reasoning seemed to be that a treaty organization owned by four

The courts have also held that the protection of the FSIA extends to the officials and employees of the foreign sovereign, to the extent they were acting within the scope of their employment and position with the foreign sovereign [9] Indeed, to allow a suit against an individual employee or official would totally eviscerate the FSIA because "[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian v Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir 1990) (holding FSIA covers employees of foreign sovereign), *citing Monell v. Department of Soc. Servs.*, 436 U S 658, 690 n 55 (1978) ("[O]fficial capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."), *see Morongo Band of Mission Indians v California State Bd. of Equalization*. 858 F.2d 1376, 1382 n 5 (9th Cir 1988) ("A

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countries necessarily had to be created under the laws of a third country The *Le Donne* court rejected that argument.

> The rationale of this FSIA exclusion [referring to the exclusion in 28 U S C § 1603(b)(3) for instrumentalities created under the laws of a third country] is the common sense presumption that when a foreign state establishes a company under the laws of yet another foreign state or acquires a company created by another country, the intention is to engage in private commercial activity, not public, non-commercial activity. The key to the presumption's validity is that the instrumentality is created or established in a country different than the owner nation Here, however, this is not the case; Gulf Air is created under the laws of the owner nations, not under the laws of any other, [sic] third countries

700 F. Supp. at 1406.

[9] *See Granville Gold Trust- Switzerland v. Commissione Del Fullimento/Inter Change Bank*, 924 F. Supp 397 (E D.N Y 1996) (FSIA applies to three individuals appointed by Swiss Court to liquidate bankrupt bank); *Kline v Kaneko*, 685 F Supp. 386, 389 (S D N Y 1988) (the FSIA applies "to individual defendants when they are sued in their official capacity"), *American Bonded Warehouse Corp v Compagnie Nationale Air France*, 653 F. Supp. 861, 863 (N.D. Ill. 1987) (holding employees of state run airline are protected by the FSIA). *Mueller v. Diggleman*, No. 82 CIV 5513, Slip op (S D N Y 1983) (holding judges and clerks of foreign courts sued in their individual capacity are entitled to immunity), *Rios*, 530 F Supp. at 371, 374 (British West Indies official immune).

claim alleged against a state officer acting in his official capacity is treated as a claim against the state itself."), *cert. denied*, 488 U S. 1006 (1989).

Furthermore, the alleged motives of the individual employees and officials are irrelevant to the extent the individual was acting in an official capacity. Thus. even if the individuals acted in an unfair manner or out of malice, they are still protected under the FSIA. *See Chuidian*, 912 F. 2d at 1106-1107 (holding that even intentional interference with contract based on malice does not eviscerate the FSIA if the individual is acting within his official capacity); *Herbage v. Meese*, 747 F. Supp. 60, 66-67 (D D.C 1990), *aff'd without op.*, 946 F 2d 1564 (D C. Cir 1991); *Kline*, 685 F. Supp. at 391

Finally, with respect to analyzing particular claims to immunity under the FSIA, Congress intended courts to apply certain burden-shifting standards. *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F 3d 1270, 1285 & n.13 (3d Cir. 1993). The defendant bears an initial burden of making a *prima facie* showing that it is a "foreign state" and thus enjoys sovereign immunity. *Id.* If this showing is made, the burden then shifts to the plaintiff to come forward with facts that would allow the court to find that an exception to immunity applies. *Id*

A. <u>The FSIA Applies to This Case</u>

In the instant case, the Plaintiff has sought direct relief *in personam* against the COE and numerous officers and employees of the COE, including ECHR.[10] The COE and ECHR claim immunity from suit under the FSIA as foreign states, and the COE and ECHR officials and employees claim derivative immunity. *See* Declaration of Roberto

[10] The FSIA vests in the U.S. District Courts original jurisdiction of any non-jury civil action against a foreign state as to any claim for relief in personam with respect to which the foreign state is not entitled to sovereign immunity 28 U S C § 1330.

Lamponi, attached hereto as Exhibit A The COE, including ECHR, is a "foreign state" under the FSIA for the reasons described above. COE and ECHR officials and employees are also entitled to rely on the sovereign immunity of COE and ECHR if their alleged actions are within the scope of their positions.

The Plaintiff complains of his experiences in Finland regarding the enforcement of Finland's criminal and/or civil law. Plaintiff further complains that, having not obtained a satisfactory resolution of his case in the Finnish courts, Plaintiff filed an appeal to the ECHR Plaintiff complains that the ECHR rejected his appeal allegedly on the basis of threatening, abusive, and provocative language in the Plaintiff's correspondence with the ECHR. The ECHR has the right to take such actions and conduct its procedures in accordance with the treaty creating the ECHR, which is the act of its sovereign member states. The individual defendants who were involved with or responsible for the administration of ECHR's procedures are within the scope of their employment in their interactions with the Plaintiff and the discretionary decision to reject Plaintiff's appeal is certainly the type of official action that the FSIA was created to protect Indeed, the individually named European Defendants have not been accused of any act that is outside the scope of their employment [11]

[11] It is not clear from the Complaint what charges are being made against the COE officials—i.e., Messrs Schwimmer, Gil-Robles, Schieder, and Haller No specific allegations are made in respect of any of these persons. Moreover, in respect of the ECHR, there are no specific allegations naming any ECHR officials other than President Palm, Ms. Kutvonen, and Ms. Reed (i e , Reid) As stated in the attached declaration from Roberto Lamponi, the COE and ECHR have attested to the legitimate scope and function of their actions However, should the Court request additional documentation, the European Defendants would be happy to provide additional support

B. Plaintiff Has Not Stated a Case For an Exception to Sovereign Immunity of the COE, Including the ECHR

Once COE, including the ECHR is found to be sovereign, the burden shifts to the Plaintiff to establish that his claims fall within a Section 1605 exception to the FSIA. *See, e.g., Federal Ins. Co.*, 12 F.3d at 1285 & n.13 In his Complaint, there are no specific allegations against most of the COE officers or employees named in the Complaint. Indeed, the only allegations in the Complaint against the European Defendants are that European Defendant Kutvonen was rude and abusive and that Ms. Kutvonen informed the President of ECHR, President Palm. that the Plaintiff flirted with Ms. Kutvonen and that Plaintiff sent her threatening letters. Plaintiff alleges that the ECHR rejected his appeal solely because of these alleged claims by Ms Kutvonen to the President of the ECHR. Given these allegations, there is no exception under 28 U S C § 1605 that would permit the Plaintiff to overcome the entitlement of the European Defendants to immunity under the FSIA Perhaps Plaintiff might attempt to argue that the alleged torts are somehow exempt under the FSIA However, under 28 U S C. § 1605, jurisdiction over the Defendants for tort claims is possible only in cases

> (5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to -- (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U S.C § 1605(a)(5).

The exception in Section 1605(a)(5), by its plain language, provides no basis for jurisdiction in this case. Here, the supposed tortious acts and omissions, as well as the supposed injury, did not occur within the United States. *See Nelson*, 507 U S. at 358 (holding that acts of detention and torture in Saudi Arabia could not give rise to jurisdiction in the United States); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (stating that Soviet Union's refusal to allow emigration of American wife's husband was not within an exemption to the FSIA), *Amerada Hess*, 488 U.S at 439 (stating that Section 1605(a)(5) applies only to torts committed in the United States and was enacted to prevent foreign diplomat's immunity to domestic tort law violations like traffic accidents) In this case, no tortious activity is alleged to have occurred in the United States And, the various actions challenged are all within scope of the discretionary function clause of Section 1605(a)(5). As such, there is no cognizable exception to the FSIA, and Plaintiff's Complaint cannot be heard by this Court

Thus, Plaintiff has offered nothing in his Complaint that comes within the scope of a legitimate exception to sovereign immunity. Accordingly, the Court should determine that Plaintiff has failed to demonstrate that a Section 1605 exception applies in this case. In the absence of an applicable Section 1605 exception, the FSIA compels a finding that the COE and ECHR and their officials and employees are immune from the instant suit. This conclusion, in turn, is the equivalent of a determination that this Court is without subject matter jurisdiction.

C. The Complaint Has Other Deficiencies

1. European Defendants

The complaint was not served properly on the individually named European defendants.

Under 28 U.S.C Section 1608(b), instrumentalities of a foreign state (which arguably includes officials and employees as defined by the case law discussed supra), must be served appropriately.[12] Such service of process involves the following:

> (b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents, or
>
> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —
>
> (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

[12] It should be noted under 28 U.S C. § 1608(d) that foreign states and their instrumentalities and agencies have sixty (60) days to respond to a properly served complaint. *See* 28 U S C § 1608(d) The summonses received by all European Defendants to date reflect the standard twenty (20) day response time under the Federal Rules In order to avoid a potential default, the European Defendants are responding in accord with the summonses, however, the European Defendants reserve the right to request that the Court extend the time of their response

> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
> (C) as directed by order of the court consistent with the law of the place where service is to be made

28 U S.C § 1608(b)

Here, there is no agreement for service of process between the individually named European Defendants and Plaintiff. Nor is there one between the Plaintiff and the COE or the ECHR. None of the Defendants have appointed anyone to accept service on their behalf in the United States, nor has Plaintiff made service as outlined in the Hague Convention on Service Abroad of Judicial And Extrajudicial Documents in Civil or Commercial Matters. In addition, the Complaints were not sent by the clerk or otherwise sent in compliance with the provisions of 28 U S.C. Section 1608(b)(3)(A-C). That is, the Plaintiff, instead of a clerk, mailed the Complaint and Summons. See Declaration of Roberto Lamponi (Exhibit A). Thus, service was improper. The purported service should be quashed.

2. <u>The Non-Resident Named European Defendants Are Not Subject to Personal Jurisdiction</u>

In *Reiss v Societe Centrale Du Groupe*, 235 F 3d 738, 746 (2d Cir. 2000), the Court of Appeals for the Second Circuit stated that under the FSIA, a determination of personal jurisdiction presupposes subject matter jurisdiction and valid service of process *See Gemini Shipping, Inc v Foreign Trade Org* , 647 F.2d 317, 319-320 (2d Cir 1981) (stating that personal jurisdiction is another protection beyond the FSIA), *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F 2d 300, 308 (2d Cir 1981), *cert. denied*, 454 U S. 1148 (1982) (even if the requirements of the FSIA are met, the Constitution still requires personal jurisdiction for suit to be brought). Here, beyond sovereign immunity, there is no predicate for the exercise of personal jurisdiction over any of the European Defendants.

A district court may only exercise personal jurisdiction over a defendant if there are certain "minimum contacts" between the defendant and the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice " *International Shoe Co v Washington*, 326 U.S 310, 316 (1945), *Jungquist v Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F 3d 1020 (D.C. Cir. 1997) (stating that foreign resident was not amenable to personal jurisdiction even if sovereign immunity did not attach), *United States v Ferrara*, 54 F.3d 825, 828 (D.C Cir 1995). The fact that a defendant is not present in a forum does not necessarily defeat personal jurisdiction If the defendant engages in conduct and has a connection to the forum that would give reason to believe he is subject to the personal jurisdiction of the forum, personal jurisdiction is legitimate *See Burger King Corp v. Rudzewicz*, 471 U.S 462, 476 (1985), *Ferrara*, 54 F 3d at 828 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U S. 286, 297, 100 S. Ct. 559, 567, 62 L Ed.2d 490 (1980)). However, the Complaint offers no support that any of the European Defendants had the requisite "minimum contacts" with the state of New York or the United States to be subject to personal jurisdiction *See Ferrara*, 54 F.3d at 828 (citing *International Shoe*, 326 U.S. at 316). As such, the Complaint, in its entirety, must be dismissed for lack of personal jurisdiction

CONCLUSION

For all the foregoing reasons, European Defendants' motion to dismiss must be granted, and the Complaint must be dismissed.

Dated: Washington, District of Columbia
July 9, 2002

Respectfully submitted,

THELEN REID & PRIEST LLP

By: ______________________
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL SOLOMON MORGAN, Plaintiff, -against- COUNCIL OF EUROPE AND THE UNITED NATIONS, ET AL. Defendants.	Case No. 02 CV-891 (CBA)(LB) **DECLARATION OF ROBERTO LAMPONI IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

ROBERTO LAMPONI, deposes and says:

1. I, Roberto Lamponi, am over the age of 18, have personal knowledge of the following facts and would testify to the following.

2 My business address is Council of Europe, 67075 Strasbourg Cedex, France

3. I am the Head of the Legal Advice Department and Treaty Office of the Council of Europe

4 I have authority on behalf of the Council of Europe and the European Court of Human Rights to assert sovereign immunity to the above-captioned civil action.

5. Copies of the Plaintiff's Complaint in the above-referenced action were received beginning on June 19, 2002. The envelopes were posted by the Plaintiff and not by the Clerk of the Court,

6. On behalf of the Council of Europe and the European Court of Human Rights, I hereby assert that the Council, including the European Court, cannot be sued in this Court for the claims arising in this lawsuit because they enjoy sovereign immunity from the jurisdiction of this Court.

7. As outlined in Plaintiff's Complaint in the above-referenced action, individuals are named as defendants. These defendants are current employees or officials of the Council of Europe and/or the European Court of Human Rights. These individuals were acting within the scope of their legitimate offices when they undertook any actions complained of by Plaintiff and are therefore entitled to share in the sovereign immunity described above.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

Roberto Lamponi

July 9, 2002
Strasbourg Cedex
France

ATTORNEY'S CERTIFICATION OF SERVICE BY MAIL

DISTRICT OF COLUMBIA)
: ss :
)

ARYEH FISHMAN, the undersigned attorney at law admitted to practice in the courts of the State of New York, hereby affirms: that he is over 18 years of age, is not a party to this action; and is associated with the law firm of Thelen Reid & Priest LLP, 701 Pennsylvania Avenue, N W , Suite 800, Washington, D C. 20004.

That on July 9, 2002 he served the attached

DEFENDANTS' NOTICE OF MOTION AND THE ACCOMPANYING MEMORANDUM OF LAW WITH EXHIBIT IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

upon the pro se Plaintiff at the address designated by him for that purpose

Michael Solomon Morgan, pro se
511 Lafayette Avenue
Brooklyn, NY 11205

Said service was made by depositing a true copy of the attached papers enclosed in a first-class postpaid sealed wrapper, properly addressed to the above-named pro se Plaintiff, in an official depository under the exclusive care and custody of the United States Postal Service within the District of Columbia.

ARYEH FISHMAN declares under penalty of perjury, pursuant to 28 U S C. § 1746. that the foregoing is true and correct. Executed on July 9, 2002.

ARYEH FISHMAN
(AF-5585)

DC #124207 v1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL SOLOMON MORGAN, Plaintiff, -against- COUNCIL OF EUROPE AND THE UNITED NATIONS, ET AL. Defendants	Case No. 02 CV- 891 (CBA)(LB) **NOTICE OF MOTION**

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Aryeh Fishman, dated July 9, 2002, and the accompanying Memorandum Of Law, European Defendants[1], by undersigned counsel, pursuant to Federal Rule of Civil Procedure 12(b), will move this Court, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, on such date and time as the Court may determine, to dismiss the Complaint of Plaintiff Michael Solomon Morgan in the above captioned action (the "Complaint") The Complaint should be summarily dismissed for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1330, 1604, 1605, 1608). The Complaint also suffers from other deficiencies: a) insufficiency of service of process; b) insufficiency of process; and c) lack of personal jurisdiction.

WHEREFORE, the European Defendants request that this Court grant their Motion to Dismiss, and enter an order to such effect

[1] The European Defendants are the Council of Europe, including The European Court of Human Rights, and its individually named officials and employees

Dated: Washington, District of Columbia
July 9, 2002

Respectfully submitted,

THELEN REID & PRIEST LLP

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